No. 86-704

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF MINNESOTA,

Petitioner,

vs.

ORVILLE BERNDT, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE, MINNESOTA COUNTY ATTORNEYS ASSOCIATION,

Joined By

NATIONAL DISTRICT ATTORNEYS ASSOCIATION, THE STATE OF FLORIDA, THE STATE OF ILLINOIS, THE STATE OF INDIANA, THE COMMONWEALTH OF KENTUCKY, THE STATE OF LOUISIANA, THE STATE OF MISSOURI, AND THE STATE OF WYOMING,*
IN SUPPORT OF PETITIONER STATE OF MINNESOTA

Of Counsel:
JACK E. YELVERTON
Executive Director
JAMES P. MANAK
Executive Editor
Nat'l District Attorneys Ass'n, Inc.
1033 North Fairfax Street
Alexandria, Virginia 22314

JEAN GERVAL
Executive Director
Minnesota County Attorneys Ass'n
TOM FOLEY
Ramsey County Attorney
STEVEN C. DeCOSTER
Counsel of Record
c/o Ramsey County Attorney's Office
St. Paul, MN 55102
Phone: (612) 298-5464

* *Each sponsored according to Rule 36.4 by its attorney general pursuant to list of counsel contained inside front cover.*

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List of Counsel continued:

The State of Florida, by and through Attorney General Jim Smith and Assistant Attorney General George Georgieff;

The State of Illinois, by and through Attorney General Neil F. Hartigan;

The State of Indiana, by and through Attorney General Linley E. Pearson;

The Commonwealth of Kentucky, by and through Attorney General David L. Armstrong;

The State of Louisiana, by and through Attorney General William J. Guste, Jr.;

The State of Missouri, by and through Attorney General William L. Webster;

The State of Wyoming, by and through Attorney General A.G. McClintock and Assistant Attorney General Allen C. Johnson.

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The Minnesota County Attorneys Association ("MCAA") and the National District Attorneys Association, Inc. ("NDAA") respectfully move for leave to file the attached brief as amici curiae. States sponsored by their attorney general according to Rule 36.4 have joined in this brief. In support of this Motion, MCAA and NDAA would show the Court as follows:

1. *Interest of Amici Curiae.* MCAA represents all the county attorneys in the State of Minnesota. By law, county attorneys have the responsibility of prosecuting all those accused of committing serious criminal offenses in their jurisdiction. MCAA has submitted numerous amicus curiae briefs to the Minnesota Supreme Court and has joined in amici briefs before this Court.

NDAA is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

2. *Specific Interest in the Case at Bar.* MCAA's and NDAA's members are continuously engaged in the prosecution of criminal cases, including many cases presenting issues related to those in the case at bar. Their statutory obligations are directly affected by the standard of review applied to determine evidentiary sufficiency. Since MCAA's and NDAA's members appear in trial courts to represent the states in these cases, they may be able to assist the Court in developing the issues fully.

3. *Purpose of Amicus Curiae Brief.* MCAA's and NDAA's purpose, in this brief, is to analyze the case authority in ways that are not present in other briefs. Amici curiae has communicated with counsel for Petitioner in an effort to avoid undue duplication. It is believed that this brief argues the issues in a manner that was not done in Petitioner's Petition for Writ of Certiorari.

4. *Public Importance of the Issues Addressed Here.* Since this Court's decisions in *Burks v. United States,* 437 U.S. 1 (1978) and *Greene v. Massey,* 437 U.S. 19 (1978), a state court's unreversed ruling of evidentiary insufficiency bars retrial under the fifth amendment's double jeopardy clause. It has been unclear whether state courts may attach the label of insufficiency to cases where the evidence satisfies the federal standard of evidentiary review. Standards of review employed by state courts have been anomalous. The decision of the Minnesota Supreme Court is an example. There is a great

need for clarification as to what standard of review must be employed to determine evidentiary insufficiency to avoid anomalous application of the double jeopardy clause.

5. *Requests for Consent.* The consent of the Petitioner to the filing of this brief has been requested and granted. The consent of Respondent has been requested and refused. This Motion is therefore filed in accordance with the Rules of this Court.

FOR THESE REASONS, MCAA and NDAA prays that it be granted leave to file the attached brief as amici curiae.

Respectfully submitted,

STEVEN C. DeCOSTER
Counsel of Record
c/o Ramsey County Attorney's Office
Suite 400, 350 St. Peter Street
St. Paul, MN 55102
Phone (612) 298-5464
Attorney for Amici Curiae

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI

Amici are prosecutor associations and states that support the Petitioner's position and urges this Court to grant a Writ of Certiorari. Amici interest in this case concerns the effect the double jeopardy clause of the fifth amendment to the United States Constitution will have upon the equitable administration of justice nationwide and upon prosecutors' ability to enforce the law if its reach is extended to every ruling of evidentiary insufficiency regardless of the standard of review utilized to reach the ruling.

Federal courts may only rule that evidence is insufficient in a case if the evidence fails to satisfy the federal standard of evidentiary sufficiency. But, as the decision below demonstrates, state courts do not necessarily adhere to the federal standard when making insufficiency rulings. State prosecutors' efforts to bring criminals to justice will be unduly hindered by the fifth amendment's double jeopardy clause if state courts are permitted to attach the label of evidentiary

insufficiency to convictions where the evidence clearly satisfies the federal standard of evidentiary sufficiency. State criminal defendants should not be extended greater constitutional immunity from retrial under the fifth amendment than that given to federal criminal defendants. To avoid the unnecessary hampering of law enforcement and the inequitable application of the double jeopardy clause's bar against retrial, insufficiency rulings by state courts and federal courts should be based upon a uniform standard of evidentiary review.

SUMMARY OF ARGUMENT

The decision below holds that the evidence is insufficient to sustain the convictions. This ruling was not based upon the federal standard of evidentiary review but, unless there is clarification by this Court, retrial will be prohibited. Since the fifth amendment's double jeopardy clause bars retrial when there is an unreversed insufficiency ruling, state court insufficiency rulings should be based upon the federal standard of evidentiary review. Whether the double jeopardy clause permits government appeals of post verdict insufficiency rulings also requires clarification by this Court. Prior decisions by this Court indicate that such appeals are constitutionally permissible. A decision by this Court will eliminate ambiguity on this issue.

ARGUMENT AND AUTHORITIES

I. THERE IS A CONFLICT BETWEEN THE DECISION OF THE COURT BELOW AND THE DECISIONS OF FEDERAL COURTS AND OTHER STATE COURTS ON THE STANDARD UTILIZED TO DETERMINE IF EVIDENCE IN A CRIMINAL CASE IS INSUFFICIENT AS A MATTER OF LAW AND RESOLUTION OF THIS CONFLICT IS OF FEDERAL CONSTITUTIONAL IMPORTANCE.

Beyond the question of the miscarriage of justice in this case is the broader question of what standard of evidentiary sufficiency must be utilized to justify applying the fifth amendment's double jeopardy clause to post verdict insufficiency rulings. In justifying extension of the double jeopardy clause to appellate insufficiency rulings in *Burks v. United States*, 437 U.S. 1 (1978), this Court emphasized that federal courts may only reverse a conviction on insufficiency grounds if the evidence fails to satisfy the federal standard of evidentiary sufficiency. Under this standard a conviction must be sustained "if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's verdict." *Id.* at 17. That the *Burks* rule was intended to only apply to cases where the evidence fails to satisfy the federal standard of evidentiary review was demonstrated by this Court's decision in *Tibbs v. Florida*, 457 U.S. 31 (1982). This Court held in *Tibbs* that the *Burks* rule does not bar retrial when a state appellate court's evidentiary reversal is based upon the weight rather than the sufficiency of the evidence. *See id.* at 47. The decision in this case presents the situation where a state court reversed on the weight of the evidence and then labelled the grounds as evidentiary insufficiency even though

the evidence is sufficient under the federal standard of evidentiary review.

A detailed explanation as to how the evidence in this case satisfies the federal standard of review is set forth in the Petition for Writ of Certiorari submitted by Petitioner, the State of Minnesota, and will not be repeated here. But a reading of the decision below in the context of the record readily shows that despite the Minnesota Supreme Court's ruling of evidentiary insufficiency, its reversal was actually based upon its subjective reweighing of the evidence. The court's failure to adhere to the federal standard's requirement of viewing the evidence in the light most favorable to the prosecution is demonstrated in several ways.

First, although the Minnesota Supreme Court's traditional standard of evidentiary review contains a similar requirement that the evidence be viewed in the light most favorable to the prosecution,[1] the decision fails to mention this requirement. Second, the decision conspicuously and repeatedly fails to mention most of the physical evidence *and* the expert conclusions based upon this physical evidence. At no point does the decision mention that the fire scene contained over sixty feet of suspicious trailering patterns that could only have been caused by a flammable liquid (Pet. 6, Pet. App. J1-4, M5-6). Instead, the

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[1] The Minnesota Supreme Court's traditional standard for reviewing evidentiary insufficiency claims is as follows:

> In reviewing a claim of sufficiency of the evidence we must determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude that the defendant was guilty of the offense charged . . . . The evidence must be viewed in the light most favorable to the prosecution and it is necessary to assume that the jury believed the state's witnesses and disbelieved any contrary evidence . . . .

State v. Ulvinen, 313 N.W.2d 425, 428 (Minn. 1981) (citations omitted).

decision creates the erroneous impression that the prosecution had no solid physical evidence and that its "entire case was bottomed on mere speculation or upon hypothesized 'facts.' "[2] *State v. Berndt*, 392 N.W.2d 876, 881 (Minn. 1986) (Pet. App. A12). Finally, the decision gives the misleading impression that certain evidence put forth by the defense constituted facts that were undisputed. The decision fails to note that the defense's theory of an accidental fire was contrary to the physical evidence and was ruled out as a possibility by the prosecution's arson experts (Pet. App. J1-4, K2-5, L4-5, L7-8, M4-5). More glaringly, the decision accepts the respondent's alleged story of escape without noting both that the physical evidence showed that the path of escape was covered with a flammable liquid making escape impossible (Pet. App. J1-4, K7, L3) and that the respondent dramatically changed his story six weeks after the fire (Pet. 8-9).[3]

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[2] The Minnesota Supreme Court's dismissal of gas chromatograph test results and burn patterns as nonevidence is contrary to holdings by other American courts. Both federal and state courts routinely admit and rely upon such evidence to sustain criminal convictions. *See e.g., United States v. Metzger*, 778 F.2d 1195, 1203-04 (6th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 3279 (1986) (chromatograph test results); *United States v. Distler*, 671 F.2d 954, 959-962 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981) (gas chromatograph test results); *Commonwealth v. Boden*, 399 Pa. 298, 306-08, 159 A.2d 894, 898-99, *cert. denied*, 364 U.S. 846 (1960) (suspicious burn patterns and expert testimony).

[3] In relying upon the fact that no odor of gasoline was detected either at the fire scene or on the respondent, the decision fails to note that numerous fire experts testified that it is common *not* to detect the odor of gasoline either at the scene or on the arsonist once the fire is ignited (Pet. App. K5-6, K9-10, K10-11, L5, O1-4). The decision also omits any reference to the fact that the defense's arson expert conceded that smoke smells can mask gasoline odors (Pet. App. O5).

The evidence showing that this was an arson fire and that the defendant was the arsonist was extremely strong when viewed in the light most favorable to the prosecution. The only evidence that was not presented was an eyewitness who saw the defendant ignite the fire. But as the Pennsylvania Supreme Court once noted, "[f]ew criminals are caught 'red-handed' and if eyewitnesses of the crime were necessary few . . . arsonists . . . could ever be convicted." *Commonwealth v. Boden*, 399 Pa. 298, 304, 159 A.2d 894, 898, *cert. denied*, 364 U.S. 846 (1960). Only by *rejecting* the prosecution's arson evidence could any reviewing court conclude that the evidence did not support the verdicts. The decision demonstrates that without viewing either the witnesses or many essential evidentiary exhibits, the court "subjectively believe[d] that [the] defendant was innocent" and called "the evidence insufficient so as to preclude a second trial, even though the evidence is technically sufficient." Note, *Tibbs v. Florida: The Weight-Sufficiency Distinction Gains Too Much Weight*, 16 Ind. L. Rev. 727, 748 n. 154 (1983). *Cf. Tibbs v. Florida*, 457 U.S. 31, 51 (1982) (White, J., dissenting) (courts may base reversal of a legally insufficient case on the weight of the evidence so that retrial will not be barred).

This decision may be one of the more blatant examples of a reviewing court erroneously labelling its subjective reweighing of the evidence as evidentiary insufficiency, but it is not the only example. In *Carter v. Estelle*, 691 F.2d 777 (1982), *cert. denied*, 460 U.S. 1056 (1983), the State of Texas contended in a federal habeas corpus proceeding that a pre-*Burks* ruling of evidentiary insufficiency by the Texas Court of Appeals was based upon the weight rather than the sufficiency of

the evidence.[4] *See id.* at 781, n.3. More notably, numerous federal review courts have been found to have erroneously labelled their disagreement with the weight of the evidence as evidentiary insufficiency. *See e.g., United States v. Singleton*, 702 F.2d 1159, 1165-67 (D.C. Cir. 1983); *United States v. Dixon*, 658 F.2d 181, 191-93 (3d Cir. 1981); *United States v. DeGarces*, 518 F.2d 1156, 1160 (2d Cir. 1975).[5] Erroneous applications of the insufficiency label have been routinely overturned by federal circuit courts of appeals even where the ruling, like the decision in this case, fails to acknowledge the true basis of its reversal and the ruling's rejection of the prosecution's evidence can only be discerned from an objective review of the record. *See e.g., United States v. Martinez*, 763 F.2d 1297, 1313-14 (11th Cir. 1985); *United States v. Burns*, 597 F.2d 939, 941 (5th Cir. 1979); *United States v. Rojas*, 554 F.2d 938, 943 (9th Cir. 1977); *United States v. Cravero*, 530 F.2d 666, 670-71 (5th Cir. 1976).

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[4] The Fifth Circuit Court of Appeals refused to consider this contention and concluded that:

> [W]hen a state appellate court characterizes its reversal of a jury verdict as based upon a test of evidentiary sufficiency . . . *Burks* applies at that point regardless of how a federal court might have applied *Jackson v. Virginia* [443 U.S. 307, *reh'g denied*, 444 U.S. 890 (1979)].

Carter v. Estelle, 691 F.2d 777, 783 (5th Cir. 1982), *cert. denied*, 460 U.S. 1056 (1983). Unlike this case which is a request for direct review of a state court's insufficiency ruling, *Carter* involved the collateral review of a state court's insufficiency ruling. *See id.* at 778.

[5] *See also United States v. Steed*, 674 F.2d 284, 289 (4th Cir.) (en banc), *cert. denied*, 459 U.S. 829 (1982); *United States v. White*, 673 F.2d 299, 304-05 (10th Cir. 1982); *United States v. Varkonyi*, 611 F.2d 84, 86 (5th Cir. 1980); *United States v. Woodruff*, 600 F.2d 174, 176 (8th Cir. 1979); *United States v. Blasco*, 581 F.2d 681, 684-85 (7th Cir. 1978).

The evidentiary sufficiency standard applied in this case conflicts not only with the federal sufficiency standard, it also conflicts with the sufficiency standard utilized by other states. Numerous state courts explicitly distinguish between reversals on the weight versus the sufficiency of the evidence. *See e.g., Dorman v. State*, 622 P.2d 448, 453-54 (Alaska 1981); *Veitch v. Superior Court*, 89 Cal. App. 3d 722, 731, 152 Cal. Rptr. 822, 824-28, *cert. denied*, 444 U.S. 940 (1979); *People v. Johnson*, 128 Mich. App. 618, 621, 341 N.W.2d 160, 162 (1983); *People v. Ramos*, 33 A.D.2d 344, 347, 308 N.Y.S. 2d 195, 198 (1970); *State v. Allery*, 322 N.W.2d 228, 233 (N.Dak. 1982); *State v. McGranahan*, 415 A.2d 1298, 1301-1303 (R.I. 1980).

Because the *Burks* rule is not applicable to reversals based upon evidentiary weight, uniformity as to the required basis for an insufficiency ruling is necessary.[6] Unless there is a uniform standard, state courts that do not distinguish between evidentiary weight and sufficiency will extend broader federal double jeopardy protection to defendants than that extended by both state courts that do make this evidentiary distinction and federal courts. Such an inequitable application of a federal constitutional right unduly frustrates the evenhanded administration of justice.

The issue is not whether a state review court may reweigh the evidence nor is it whether a state court may bar retrial under its own state constitution when reversals are based

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[6] In *Hudson v. Louisiana*, 450 U.S. 40 (1981), this Court established that state courts may not employ a lesser standard of evidentiary review than that used by federal courts when determining application of the *Burks* rule. *See id.* at 43-45. Conversely, state courts should not be permitted to employ a more stringent evidentiary standard than that used by federal courts for the purposes of determining application of the fifth amendment's double jeopardy clause.

upon the weight of the evidence. Instead, the issue is whether a state reviewing court may extend the federal constitution's double jeopardy clause to evidentiary reversals where the record demonstrates that the reversal was based upon the weight of the evidence. Allowing a state appellate court to erroneously label as insufficient a conviction that satisfies the federal standard of evidentiary review results in the unnecessary extension of the *Burks* rule to cases where retrial does not offend the double jeopardy clause. Just as a federal reviewing court is not permitted to mislabel a legally sufficient conviction as insufficient, a state appellate court should not be permitted to do so.

Allowing a state court *to reverse and immunize* a defendant when the record shows there is ample evidence to support his guilt not only unnecessarily frustrates proper law enforcement, it also brings the danger that the criminal law and the administration of justice will be brought into public contempt. This danger can only be avoided if the *Burks* rule is limited to those cases where the prosecution's failure is clear. Whether the *Burks* rule should be applied to insufficiency reversals that are not based upon the federal standard of evidentiary review is a question of constitutional importance that needs to be addressed by this Court.

II. THE DECISION'S IMPLICIT RULING THAT THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE BARS REVIEW OF POST VERDICT RULINGS OF INSUFFICIENCY CONFLICTS WITH DECISIONS BY THE FEDERAL CIRCUIT COURTS OF APPEALS AND RAISES AN ISSUE OF FEDERAL CONSTITUTIONAL IMPORTANCE.

The decision below dictates the conclusion that the Minnesota Supreme Court determined that the fifth amendment bars government appeals of post verdict insufficiency rulings. This question was raised by the State of Minnesota in its petition for rehearing (Pet. App. I41-45) but was not directly ruled upon by the Minnesota Supreme Court in its denial of the petition. That the court implicitly ruled that insufficiency rulings are not reviewable is demonstrated by its reversal without remand *and* its refusal on rehearing to examine previously overlooked evidentiary exhibits. Only if the double jeopardy clause bars further review could the court's adamant refusal to examine the evidence be justified.

The Minnesota Supreme Court's implied ruling conflicts with rulings by twelve of the federal circuit courts of appeals. These courts have repeatedly held that the double jeopardy clause does not bar government appeals of post verdict rulings of evidentiary insufficiency. *See e.g., United States v. Martinez*, 763 F.2d 1297, 1311 (11th Cir. 1985); *United States v. Singleton*, 702 F.2d 1159, 1161-62 (D.C. Cir. 1983); *United States v. Steed*, 674 F.2d 284, 285-86 (4th Cir.) (en banc), *cert. denied*, 459 U.S. 829 (1982); *United States v. Forcellati*, 610 F.2d 25, 30 (1st Cir. 1979), *cert. denied*, 445 U.S. 944 (1980); *United States v. Jones*, 580 F.2d 219, 221-22 n. 3 (6th Cir. 1978); *United States v. Calloway*, 562 F.2d 615, 616-17 (10th Cir. 1977); *United States v. Cahalane*, 560 F.2d 601,

603, n. 2 (3d Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978); *United States v. Allison*, 555 F.2d 1385, 1387 (7th Cir. 1977); *United States v. Rojas*, 554 F.2d 938, 941-42 (9th Cir. 1977); *United States v. Donahue*, 539 F.2d 1131, 1133-34 (8th Cir. 1976); *United States v. Cravero*, 530 F.2d 666, 669 (5th Cir. 1976); *United States v. DeGarces*, 518 F.2d 1156, 1159 (2d Cir. 1975).

Prosecution appeals of post verdict insufficiency rulings is consistent with previous double jeopardy decisions by this Court. *See e.g., United States v. DiFrancesco*, 449 U.S. 117, 130 (1980); *United States v. Wilson*, 420 U.S. 332, 344-45 (1975). But this Court has never directly ruled that appeals from post verdict acquittals are permissible under the double jeopardy clause. A decision by this Court in this case would resolve this conflict. A holding that such appeals are constitutionally permissible would clearly authorize reconsideration of evidence by reviewing courts and enable prosecutors to seek the correction of insufficiency rulings that are based upon an incomplete review of the evidentiary record.

CONCLUSION

The decision below conflicts with the evidentiary review standards applied by other courts. It presents substantial questions that have not been, but should be, decided by this Court. The Court should grant the writ to resolve the conflicts and consider the substantial questions presented.

Respectfully submitted,

JEAN GERVAL
Executive Director
Minnesota County Attorneys Association
TOM FOLEY
Ramsey County Attorney
STEVEN C. DeCOSTER
c/o Ramsey County Attorney's Office
Suite 400, 350 St. Peter St.
St. Paul, MN 55102
Phone: (612) 298-5464
Attorneys for Amici Curiae